No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents,

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MEMORANDUM OF CERTAIN RESPONDENTS IN OPPOSITION TO THE MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

Stephen D. Susman
Mandell & Wright
806 Main Street
Houston, Texas 77002
(713) 228-1521

Lowell E. Sachnoff
Sachnoff Schrager Jones
Weaver & Rubenstein, Ltd.
One IBM Plaza
Chicago, Illinois 60611
(312) 644-2400

Attorneys for
Plaintiff-Respondents

Henry L. King
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4284

On behalf of Attorneys for
Defendant-Respondents listed
at end of Memorandum

Table of Contents

	Page
TABLE OF AUTHORITIES	ii
MEMORANDUM OF CERTAIN RESPONDENTS IN OPPOSITION TO THE MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER.	1
I. PROCEDURAL HISTORY.	2
A. The Issue of Contribution	2
B. The Issue of Claim Reduction.	5
C. Respondents' Motion to Dismiss the Writ of Certiorari	6
II. ARGUMENT.	6
CONCLUSION	10

Table of Authorities

Cases

	Page
Alejandrino v. Quezon, 271 U.S. 528 (1926).	10
Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968).	7
Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89 (4th Cir.), cert. denied, 343 U.S. 963 (1952).	7
Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944).	7
In re Grand Jury Investigation, 587 F.2d 598 (3d Cir. 1978).	6
McKenna v. Pan American Petroleum Corp., 303 F.2d 778 (5th Cir. 1962).	6,7
Morin v. City of Stuart, 112 F.2d 585 (5th Cir. 1939)	9
Mullaney v. Anderson, 342 U.S. 415 (1952)	7
NLRB v. Acme Industrial Co., 384 U.S. 925 (1966).	7
Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).	2
Roe v. Wade, 410 U.S. 113 (1973)	9
Rogers v. Paul, 382 U.S. 198 (1965).	7
Texas Industries, Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3570 (No. 79-1144) (cert. pending).	9,10
Thomson-Houston Electric Co. v. Western Electric Co., 158 F. 813 (2d Cir. 1907)	7
UAW v. Scofield, 382 U.S. 205 (1965)	7

United States v. St. Louis Terminal,
236 U.S. 194 (1915). 7

United States v. 22,680 Acres of Land,
438 F.2d 75 (5th Cir. 1971). 6,7

Wenborne-Karpen Dryer Co. v. Cutler
Dry Kiln Co., 292 F.861
(2d Cir.), cert. denied,
263 U.S. 708 (1923). 6

Other Authority

R. Stern & E. Gressman,
Supreme Court Practice (5th ed. 1978). 6,7

No. 79-972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WESTVACO CORPORATION,
PACKAGING CORPORATION OF AMERICA and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

ADAMS EXTRACT COMPANY, et al.,

Respondents,

MEMORANDUM OF CERTAIN RESPONDENTS IN OPPOSITION TO THE MOTION OF THE MEAD CORPORATION FOR LEAVE TO INTERVENE AS A PARTY PETITIONER

This Court granted the petition for a writ of certiorari of Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("Packaging Corporation") and Georgia-Pacific Corporation ("Georgia-Pacific") (collectively "petitioners"), defendants in the Corrugated Container Antitrust Litigation, M.D.L. 310, concerning the issue of whether defendants may assert rights of contribution in the circumstances of that litigation.

On September 17, 1980, The Mead Corporation ("Mead"), which had petitioned to proceed as amicus curiae before this Court, moved for leave to intervene as a party petitioner. The undersigned respondents oppose Mead's motion.

I

PROCEDURAL HISTORY

A. The Issue of Contribution

A brief recapitulation of certain prior proceedings and Mead's role therein is necessary to evaluate its present motion. On December 11, 1978 and March 1, 1979, Westvaco filed motions in the United States District Court for the Southern District of Texas for leave to assert cross-claims for contribution against settling defendants (J.A. 74, 128).* On May 9 and 10, 1979, Packaging Corporation and Georgia-Pacific filed similar motions (J.A. 223, 231).

On May 30, 1979, petitioners' motions for leave to assert the cross-claims were denied by the District Court, which entered final judgment pursuant to Rule 54(b), F.R.C.P. (J.A. 250). Petitioners appealed from that judgment in June 1979 (J.A. 272-74). The United States Court of Appeals for the Fifth Circuit, on October 30, 1979, affirmed the District Court's ruling disallowing claims of contribution (J.A. 277).

At the time the petitioners elected to raise the issue of contribution against settling defendants in the Southern District of Texas, Mead chose to assert its contribution claims in a different forum. Following the United States Court of Appeals for the Eighth Circuit's decision on contribution in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), Mead filed a separate complaint on May 21, 1979 in the United States District Court for the District of Minnesota, The Mead Corpora-

---

* "J.A." refers to the Joint Appendix filed herein.

tion v. Alton Box Board Co., Civil No. 4-79-245, seeking contribution from all defendants in M.D.L. 310.* On June 5, 1979, the Judicial Panel on Multidistrict Litigation transferred Mead's complaint for contribution from the District of Minnesota to the Southern District of Texas for pretrial proceedings as part of M.D.L. 310.

Although on notice that the issue of contribution was to be decided by the Court of Appeals on petitioners' appeal, Mead did not seek to intervene as a party appellant in that forum. Rather, on September 14, 1979, with its separate action for contribution still pending in the District Court, Mead sought and was granted leave to file an amicus curiae brief out of time in support of the petitioners' position on appeal.

After the Court of Appeals rendered its decision, certain defendants moved to dismiss Mead's separate complaint for contribution on November 29, 1979. On December 21, 1979, the District Court entered an order dismissing Mead's claim for contribution with prejudice, citing its own prior opinion and the affirmance of that decision by the Court of Appeals. That order also dismissed with prejudice all other contribution claims and cross-claims still pending in M.D.L. 310. Mead did not appeal from that decision. Instead, on January 3, 1980, Mead filed a motion requesting that the District Court reconsider. No order has been entered on the motion for reconsideration.

---

* The history of Mead's procedural moves in this litigation is reflected in the record below and, to some extent, in the motion of Mead to file an amicus brief filed with the Court on August 29, 1980.

With respect to the present petition for certiorari, Mead initially followed the same tactics it had employed in the Court of Appeals. On August 28, 1980, Mead filed a motion for permission to file an amicus curiae brief in support of petitioners' position before this Court. The motion was accompanied by Mead's proposed brief on the merits. On September 13, 1980, Mead moved for leave to present oral argument to this Court as amicus. In that motion, Mead stated that petitioners Georgia-Pacific and Packaging Corporation had yielded time to allow Mead to argue (Motion at p. 2).

Recent developments in the class action trial, however, caused Mead to abandon this approach. Two of the petitioners, Georgia-Pacific and Packaging Corporation, entered into settlement agreements prior to trial. The class action trial commenced on June 9, 1980 in Houston against three defendants -- Mead, Alton Box Board Company ("Alton") and the third petitioner Westvaco. On July 11, 1980, Alton entered into a settlement with the class. On September 3, 1980, Westvaco also settled its claims with plaintiffs, leaving Mead as the sole defendant on trial. On September 13, 1980, the jury returned a verdict against Mead, finding that Mead had participated in a conspiracy to fix prices of corrugated materials during the period from January 1, 1964 to December 31, 1975. The jury concluded that the class had been damaged by 5% during the damage period, March 7, 1973 to December 31, 1975. No final judgment has been entered as yet.

B. The Issue of Claim Reduction

At the same time the three petitioners moved in the District Court for leave to file contribution cross-claims, they also sought leave to amend their answers to assert claim reduction as an affirmative defense. Mead made a similar motion to amend its answer to assert claim reduction. These motions were denied by the District Court in the same order in which that court denied petitioners' motions with respect to contribution (Pretrial Order No. 13, May 30, 1979, J.A. 250). However, although the District Court entered an appealable final judgment on petitioners' contribution cross-claims, it specifically did not do so in denying their and Mead's motions for leave to assert the affirmative defense of claim reduction (compare ¶ 1 with ¶ 2 of Pretrial Order No. 13, J.A. 250). Mead did not appeal from that order.*

On the appeal by the three petitioners, the Court of Appeals, as noted, affirmed on the contribution issue. But it did not rule on the claim reduction issue:

> "We find that the second question dealing with claim reduction is not properly before us. Although the district court did enter an appropriate final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the cross-claims (right of contribution), it refused to do so as to the affirmative defense (claim reduction). Under these circumstances we have no jurisdiction to consider this issue" (J.A. 278).

---

* In its motion to intervene, Mead does not refer to its separate motion to assert the claim reduction affirmative defense, or its denial by the District Court on May 30, 1979. Instead, Mead states that the claim reduction issue was raised in its separate complaint filed in the District Court in Minnesota (see Motion at ¶2). However, that complaint refers only to contribution and does not refer to claim reduction.

C. Respondents' Motion to Dismiss the Writ of Certiorari

On September 24, 1980 respondents (including plaintiffs and most defendants below) moved to dismiss the petition herein. The motion was based upon events that occurred after the granting of certiorari and that critically altered the character of the case as originally presented -- the three petitioners settled the lawsuit and no longer have any claim for contribution against settling defendants. The only remaining issue sought to be argued, that relating to claim reduction, is not properly before the Court in light of the jurisdictional history relating to that issue recited above.

II

ARGUMENT

Applications to intervene at the appellate level are granted "only in an exceptional case for imperative reasons." McKenna v. Pan American Petroleum Corp., 303 F.2d 778, 779 (5th Cir. 1962). Accord, In re Grand Jury Investigation, 587 F.2d 598 (3d Cir. 1978); Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 292 F.861 (2d Cir.), cert. denied, 263 U.S. 708 (1923). Applications to intervene at the Supreme Court level are even more rarely granted. See R. Stern & E. Gressman, Supreme Court Practice, §6.17, at 436 (5th ed. 1978).

Far from constituting "imperative reasons", the circumstances surrounding Mead's petition render it a particularly inappropriate candidate for this rarely granted privilege. The courts have repeatedly rejected applications for intervention at the appellate level where the applicant could have intervened at an earlier stage. United States v.

22,680 Acres of Land, 438 F.2d 75, 76 (5th Cir. 1971); McKenna v. Pan American Petroleum Corp., supra; Consolidated Gas, Electric Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89 (4th Cir.), cert. denied, 343 U.S. 963 (1952); Thomson-Houston Electric Co. v. Western Electric Co., 158 F. 813 (2d Cir. 1907).*

---

* The six cases cited by Mead do not support its motion to intervene. In four of the six cases, the intervenors were not parties to the proceedings below and therefore lacked either a reason or an opportunity to intervene at an earlier stage. In Rogers v. Paul, 382 U.S. 198 (1965) the Court permitted the addition as parties plaintiff of two new members of the class on whose behalf the suit had been brought. Similarly, in Mullaney v. Anderson, 342 U.S. 415 (1952), the Court found that the union members added as parties plaintiff were the principals and real parties in interest to the suit; they were added when the defendants questioned the standing of the plaintiff union to bring the suit on its members' behalf. In Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968), the Court permitted intervention by a real party in interest upon a showing that the party who had represented movant's interests below did not intend to seek certiorari. See R. Stern & E. Gressman, Supreme Court Practice, supra, § 2.4 at 59. And in Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944), intervention was permitted where the intervenor had not appeared before the reviewing court below only because of lack of notice of the proceedings. Unlike the intervenors in Eastern-Central Motor Carriers Association, Mead was on notice of the appeal to the Court of Appeals raising issues similar to its separate complaint for contribution, and Mead could have petitioned for intervention at that stage. Unlike the intervenors in Rogers and Mullaney, Mead was not a member of a class or group represented by petitioners below. Unlike Chicago Grain Trimmers, petitioners in this case have not purported to represent Mead's interests at any stage of this litigation.

The other two cases cited by Mead are inapposite. The Court permitted intervention in United States v. St. Louis Terminal, 236 U.S. 194 (1915), for the limited purpose of ensuring that details of an antitrust compliance decree did not unnecessarily harm movants, who were innocent third parties. In NLRB v. Acme Industrial Co., 384 U.S. 925 (1966), the Court permitted a union to intervene pursuant to its decision in UAW v. Scofield, 382 U.S. 205 (1965), interpreting the National Labor Relations Act to allow intervention in appeals of NLRB orders by the party which had prevailed below.

Here, Mead was on notice that the issue of contribution was being litigated in the Court of Appeals and in this Court. Rather than moving for intervention, Mead chose to participate as amicus curiae in the Court of Appeals and, initially, in this Court. Those decisions may well have been motivated by tactical considerations. In the event that petitioners were successful in either court, Mead would assert that such a favorable decision controlled its status. In the event that petitioners were to fail, Mead would doubtless assert that it was not bound by such an adverse decision. However, with the settlement by Westvaco, Mead has lost its stalking horse. Faced with the recent jury verdict against it, Mead has moved to intervene to propound the right of contribution for itself. The failure of Mead's tactics does not constitute the kind of compelling justification for intervention at the appellate level that the courts have uniformly required.

Mead's petition to intervene is an attempt to circumvent the usual appellate process. After its complaint for contribution was dismissed in December 1979, Mead chose to make a motion for reconsideration rather than appealing that order. Having elected to forego an appeal, Mead cannot cure the jurisdictional and procedural defects of Georgia-Pacific and Packaging Corporation (set out in respondents' motion to dismiss the writ of certiorari) by trying in effect to invoke this Court's original jurisdiction. See Morin v. City of Stuart, 112 F.2d 585 (5th Cir. 1939).

Mead contends that because the contribution issue is "likely to recur" it is not moot. Motion at ¶2. As we pointed out in our motion to dismiss the writ of certiorari,

an issue must not only be "capable of repetition" but also "evade review." Roe v. Wade, 410 U.S. 113, 125 (1973). Mead is unable to point to anything about the way contribution arises in antitrust litigation which renders it evasive of review and the pendency of Texas Industries, Inc. v. Radcliffe Materials, Inc., 48 U.S.L.W. 3570 (No. 79-1144) (cert. pending) indicates that the issue is not one which routinely becomes moot.*

Finally, to the extent that Mead attempts to intervene to inject claim reduction as one of the issues to be considered upon this writ of certiorari, as it did in its amicus curiae brief, Mead's motion must be denied since that issue is not before this Court. As set forth above, the petitioners raised the claim reduction issue when they sought leave to

---

* Mead further suggests that the various cross-claims for contribution asserted in the opt-out cases supply the missing "case or controversy." Motion at ¶4. The petitioners, however, failed to make any kind of record in the Court of Appeals concerning the opt-out cases, which were not a factor in the decisions below.

As noted in the respondents' motion to dismiss the writ of certiorari, petitioners argued for contribution and claim reduction in the context of a series of settlements by co-defendants in the class action which left the defendants with the choice of meeting the class' settlement demands or risking a verdict based on the liability of all defendants, including those who had settled. There have been no such settlements in the opt-out cases. Petitioners' belated attention to the opt-out cases at this time cannot change the record on the writ of certiorari, which is virtually bereft of references to non-class action cases. The opt-out cases are not more than "incidental" features of this appeal, which is moot "as respects its main features." Alejandrino v. Quezon, 271 U.S. 528, 535 (1926).

Moreover, it should be noted that contribution cross-claims in opt-out cases were dismissed by order dated December 21, 1979, after the Court of Appeals had affirmed the District Court on the issue, and no appeal has been taken from that December order.

amend their answers to assert claim reduction as an affirmative defense (J.A. 135, 231 and 241). On May 25, 1979, Mead also filed in the District Court a motion to amend its answers to assert claim reduction. Mead's motion was denied by the District Court at the same time that it denied the similar motions by petitioners (J.A. 250). The District Court did not enter an appealable final judgment on that issue (J.A. 250), and the Court of Appeals held that the "question dealing with claim reduction is not properly before us . . . . Under these circumstances we have no jurisdiction to consider this issue" (J.A. 278). Thus, according to the Court of Appeals ruling, the issue of claim reduction is not before the Court at this time. Mead will have the opportunity to present the issue of claim reduction in ripe form for decision upon any appeal from a final judgment against it awarding damages.

CONCLUSION

For the foregoing reasons, Mead's motion for leave to intervene as a party petitioner in this matter should be denied.

Dated: September 26, 1980

Henry L. King

Stephen D. Susman
Mandell & Wright
806 Main Street
Houston, Texas 77002

Lowell E. Sachnoff
Sachnoff Schrager Jones
Weaver & Rubenstein, Ltd.
One IBM Plaza
Chicago, Illinois 60611

Attorneys for Plaintiff-Respondents

Henry L. King
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for respondent
International Paper Company

R. Clifford Potter
Bell, Boyd, Lloyd, Haddad & Burns
135 South LaSalle Street
Chicago, Illinois 60603

Attorneys for respondent
Boise Cascade Corporation

Robert B. Abendroth
Whyte & Hirschboeck
2100 Marine Plaza
Milwaukee, Wisconsin 53202

Attorneys for respondents
Champion International, Inc. and Hoerner Waldorf Corporation

Thomas G. Slater, Jr.
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212

Attorneys for respondent
The Chesapeake Corporation of Virginia

Michael H. King
Ross, Hardies, O'Keefe, Babcock & Parsons
One IBM Plaza
Suite 3100
Chicago, Illinois 60601

Attorneys for respondent
Consolidated Packaging Corporation

David E. Bennett
Chadwell, Kayser, Ruggles
McGee & Hastings Ltd.
8500 Sears Tower
Chicago, Illinois 60606

Attorneys for respondent
Container Corporation
of America

W. Donald McSweeney
Schiff, Hardin & Waite
7200 Sears Tower
Chicago, Illinois 60606

Attorneys for respondent
The Continental Group, Inc.

Bruce A. Hecker
Shea & Gould
330 Madison Avenue
New York, New York 10017

Attorneys for respondent
Diamond International
Corporation

John F. Burke
Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza
Suite 3100
Chicago, Illinois 60601

Attorneys for respondent
Dura-Containers, Inc.

David T. Hedges, Jr.
Vinson & Elkins
2100 First City National
Bank Building
Houston, Texas 77002

Attorneys for respondent
Inland Container Corporation

Kael B. Kennedy
Katten, Muchin, Zavin,
Pearl & Galler
4100 Mid-Continental Plaza
55 East Monroe Street
Chicago, Illinois 60603

Attorneys for respondent
Interstate Container
Corporation

Richard M. Clinton
Bogle & Gates
Bank of California Center
Seattle, Washington 98164

Attorneys for respondent
Longview Fibre Company

MacDonald Flinn
White & Case
14 Wall Street
New York, New York 10005

Attorneys for respondent
MacMillan Bloedel, Inc. and
MacMillan Bloedel Containers,
Inc.

C. Kenneth Shank
Webster & Sheffield
One Rockefeller Plaza
New York, New York 10020

Attorneys for respondent
Olinkraft, Inc.

Earl E. Pollock
Sonnenschein, Carlin, Nath
& Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

Attorneys for respondent
Owens-Illinois, Inc.

Richard N. Carrell
Scott, Douglas & Keeton
4400 First International Plaza
Houston, Texas 77001

Attorneys for respondent
St. Joe Paper Company

H. Richard Wachtel
LeBoeuf, Lamb, Leiby & MacCrae
140 Broadway
New York, New York 10055

Attorneys for respondent
St. Regis Paper Company

Robert J. Bagdasarian
Breed Abbott & Morgan
153 East 53rd Street
New York, New York 10022

Attorneys for respondent
Union Camp Corporation

David Bland
Barrow, Bland & Rehmet
Two Allen Center
Suite 3000
1200 Smith Street
Houston, Texas 77002

Attorneys for respondent
U.S. Corrugated Fibre-Box
Company

Attorneys for Defendant-
Respondents